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September 15, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Errata to Reply Comments of North American GSM Alliance in RM 9328 -- ICO Petition for Expedited Rule Making To Establish Eligibility Requirements for the 2 GHz Mobile Satellite Service

Dear Ms. Roman Salas:

On September 11, 1998 I filed Reply Comments in the above captioned case. Upon further review of these Reply Comments, I have identified an error on page 7 note 15 and in the accompanying text.

With this letter I enclose five corrected copies of the pleading. These are identical to the copies filed on September 11, except that a corrected version of page 7 has been inserted. Please substitute them for the copies filed with your office on Friday, September 11. We are re-serving the corrected pleading on all parties. If you have any questions, please contact me directly at (202) 730-1331.

Respectfully submitted,

Kelly S. McGinn

Kelly S. McGinn

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
ICO SERVICES LIMITED	)	RM No. 9328
	)	
Petition for Expedited Rule Making to Establish Eligibility Requirements for the 2 GHz Mobile Satellite Service	)	

REPLY COMMENTS OF NORTH AMERICAN GSM ALLIANCE LLC

The North American GSM Alliance LLC hereby replies to the comments filed regarding the above-referenced Petition for Expedited Rule Making filed by ICO Services Limited. The GSM Alliance previously submitted comments in support of that petition based on its members' recognition of the need for expeditious licensing and rulemaking in the 2 GHz proceedings.

The GSM Alliance supports ICO's proposed eligibility and processing rules for several reasons. First, they would promote increased competition in the provision of MSS service through the introduction of a "new entrant" eligibility criterion. Second, they are premised on the simple fact that some of the 2 GHz MSS spectrum can only be used in ITU Region 2. Third, the ICO petition deals honestly with the inconvenient truth so many of the commenters would like to ignore: The FCC's sometime practice of holding up all applications while the applicants negotiate among themselves has

become a dated artifact from the industry's infancy, which in the current environment serves only to delay service to the public.

In the interest of promoting competition in the MSS market and increasing the availability of wireless service to ordinary Americans across the United States, as it considers the ICO petition the Commission should: 1) authorize global proposals in globally available spectrum and regional ones in regionally available spectrum; and 2) adopt the "new entrant" eligibility criterion as a useful means of promoting competition in MSS service.

I. The 2 GHz Band Should Be Segmented into Global and Regional Portions

Before turning to the major points of disagreement in the comments, it is worth noting that no commenter seriously disputes that at least some of the 2 GHz MSS band should be available only for regional systems. Indeed, one commenter urges that regional GSO MSS systems be provided access to all allocated MSS spectrum.[1] The GSM Alliance urges the Commission to designate at least 15 MHz in each direction for regional service, since 15 MHz of the uplink (2010-2025 MHz) is simply not available for global MSS systems.

The Commission in its *First Report and Order* concluded that this spectrum "would provide communications to underserved areas, such as *rural and remote* areas where

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[1] Comments of TMI at 3 (August 27, 1998).

PCS and cellular, and other mobile services are less feasible." [2] No party has disputed ICO's proposal that only regional systems like Celsat's should have exclusive use of the spectrum allocated to Region 2.

This concept of regional spectrum for regional systems is, perhaps, self-evident. However meritorious global coverage may be, the FCC has recognized that there is also a need for inexpensive regional coverage. As the GSM Alliance has noted in previously filed comments, Celsat through its low-cost service (pennies per minute for a phone call) uniquely satisfies this requirement. The press relates that the price for a phone for some of the global systems will be in the range of thousands of dollars – the average annual salary in some regions of the world. At a price of a few to seven dollars a minute for a phone call for these global systems, a several-minute phone call will cost nearly a day's pay in those same regions, and would be beyond the means of many Americans as well. Furthermore, many foreign markets are not open to the U.S., so that the FCC should not rely on global services to develop so quickly or competitively.

Under the ICO proposal, globally available spectrum would be assigned to conditionally licensed global systems and regionally available spectrum would be assigned to conditionally licensed regional systems. The GSM Alliance agrees generally with this proposal but would propose that the 15 MHz of regional uplink spectrum be paired with a full 15 MHz for the 2 GHz downlink.

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[2] *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, 12 F.C.C. Rcd. 7388, 7395 (1997) (emphasis added).

II. Favoring New Entrants Will Promote Innovative Service and Combat the Increasing Concentration of Market Power in the Hands of Incumbent Licensees

The GSM Alliance urges the Commission to exercise its rulemaking authority to establish eligibility criteria that will promote increased competition in the industry. Adopting a "new entrant" criterion would serve as a valuable cornerstone for such a rules-based approach in the 2 GHz proceeding. Favoring new entrants over incumbents would serve the Commission's goal of "creating a regulatory environment facilitating the provision of efficient, innovative and cost-effective satellite communications services in the United States . . . by promoting fair and vigorous competition . . . and by inhibiting 'warehousing' of spectrum.[3]

Despite their criticism of the "new entrant" criterion proposed by ICO, the Big LEO commenters nonetheless go to great pains to claim "new entrant" status in the 2 GHz proceeding. Constellation suggests that it should not be considered an incumbent here because it wants to use 2 GHz spectrum for "a new range of services."[4] Yet most of the Big LEO systems have openly sought additional spectrum in the 2 GHz band for "expansion" purposes,[5] and Constellation provides no evidence that MSS at 2 GHz is

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3 *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, 11 F.C.C. Rcd. 19841, ¶ 10 (1996).

4 Opposition of Constellation Communications, Inc. ("Constellation") at 4 (August 27, 1998).

5 Opposition of Mobile Communications Holdings Inc. to Petition for Expedited Rulemaking of ICO Services Limited ("MCHI") at In. 1 (August 27, 1998); Comments of Iridium ("Iridium") at 10-11 (August 27, 1998).

likely to be different in kind from MSS in the Big LEO bands. Iridium likewise attempts to remove itself from the class of incumbent licensees by claiming that it is not licensed in the Big LEO band "in its calculation"[6] – presumably on the dubious ground that Iridium's Big LEO license was actually granted to Motorola Satellite Communications, Inc. It is this kind of maneuvering and failure to acknowledge basic facts that vividly illustrates why leaving spectrum allocations up to the applicants to settle in private industry negotiations is doomed to failure and not in the public interest.

At bottom, the only serious arguments raised by the commenters against the "new entrant" criterion are that it is inconsistent with *Ashbacker*[7] and that it is less efficient than the "file and negotiate" formula that has often delayed the licensing process unnecessarily in the past. Neither argument is persuasive.

a) The processing round model is not required by *Ashbacker*.

Several commenters suggest that the Commission may not license MSS applicants outside a processing round marked by "band sharing through applicant negotiations."[8] However, the Commission's use of its rulemaking authority to resolve mutual exclusivity has been expressly upheld by the Supreme Court. In *FCC v. National Citizens Commission For Broadcasting*,[9] the Court emphatically affirmed the Commission's general

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6 Iridium at 10.

7 *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945).

8 See e.g., Iridium at 4-5.

9 436 U.S. 775 (1978).

rulemaking authority and power to deny applications without further inquiry where license applicants do not qualify under the standards set forth in those regulations.

> ". . . [I]t is now well established that this general rulemaking authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable. If a license applicant does not qualify under standards set forth in such regulations, and does not proffer sufficient grounds for waiver or change of those standards, the Commission may deny the application without further inquiry."[10]

The Commission has used exactly this method of resolving mutual exclusivity in the past. By 1985, the Commission had already formally adopted rules that gave new entrants preferential access to geostationary orbital locations, with stricter limits on the availability of "expansion" locations for incumbents.[11] This limitation on the assignment of orbital resources for planned "expansion" is still in effect for geostationary systems today.[12]

Ironically, one of the "success stories" cited by Iridium, the "processing round for GSO applicants in the Ka-band,"[13] is an example of the Commission's judicious use of its rulemaking authority to resolve mutual exclusivity. Faced with a number of competing applications for incompatible uses of the 28 GHz band, the Commission constituted the interested parties into an advisory committee and told them to work

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10 *Id.* at 793-94.

11 *Licensing Space Stations in the Domestic Fixed-Satellite Service*, 58 Rad. Reg. (P & F) 1267 (1985); *See Domestic Fixed-Satellite Service – Orbit Deployment Plan,* 84 F.C.C. 2d 584 (1981).

12 47 C.F.R. § 25.141(f) (1998).

13 Iridium at 5.

everything out, much as the Big LEOs suggest here. *They failed.* Instead, they reached an impasse that was, with apologies to Thomas Hobbes, nasty, brutish, and *long* – four years long. The only reason there ever was such a thing as a "processing round for GSO applicants in the Ka band" is because the Commission finally stepped in and used its rulemaking authority to impose a band segmentation plan that set GSO FSS applicants apart from NGSO FSS, MSS feeder links, and LMDS. The Commission's use of its rulemaking authority allowed the parties to stop coveting each others' spectrum and instead move forward with plans to provide service to the public. This lesson, which took four years to learn, should not be forgotten so soon.

b) The processing round model does not serve the public interest.

In addition to the Ka-band example just discussed, the Big LEO commenters assert that the Commission's customary procedures for resolving mutual exclusivity led to successful resolution of the first and second Little LEO processing rounds and the Big LEO proceeding.[14] Nothing could be further from the truth.

First, each of these processing rounds took years to complete and significantly delayed provision of service to the public. The Big LEO processing round lasted over four years.[15] Similarly, each of the Little LEO rounds took over four years to resolve.[16]

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14 Iridium at 5.

15 The Big LEO proceeding was initiated in late 1990 when Ellipsat Corporation, now Mobile Communications Holdings Inc. (MCHI), and Motorola Satellite Communications filed applications to construct LEO satellite systems. Motorola received its license in 1995. *See Motorola Satellite Communications, Inc.*, 10 F.C.C. Rcd. 2268 (Int'l Bur. 1995). MCHI received its license in 1997. See *Mobile Communications Holdings, Inc.*, 12 F.C.C. Rcd. 9663 (Int'l Bur. and Off. of Eng'g and Tech. 1997).

Unfortunately, similar delays appear inevitable in the 2 GHz processing round if the same tired procedure is applied because the applicants will not have any more incentive to compromise than did the applicants in prior rounds.

Second, in the aforementioned processing rounds, the mutual exclusivity problem was resolved *in spite of* industry negotiations, not because of them. In each of these rounds, factors wholly unconnected to the industry negotiations ultimately led to resolution of mutual exclusivity. For example, in the Big LEO processing round, the negotiating applicants were not able to develop a set of technical parameters and sharing criteria that would accommodate all the proposed systems.[17] It was only after the Commission developed a sharing plan capable of accommodating five of the six applicants that the round was concluded. In its Report and Order, the Commission expressed its frustration with the seemingly never-ending negotiations in the Big LEO processing round. "We do not intend to continue our already-prolonged attempt to resolve this proceeding by compromise in the event that mutual exclusivity among the Big LEO applicants is not eliminated by amendments submitted by the November 16,

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16 The first Little LEO processing round began in 1990 when Orbital Communications Corporation (Orbcomm) filed an application proposing a commercial Little LEO system. The first Little LEO license was granted in October, 1994, the second on July 21, 1995, and the third on November 13, 1995. *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service, Report and Order*, 13 F.C.C. Rcd. 9111 (1997). The second Little LEO processing round was launched in September, 1994 and licenses were finally issued in 1998.

17 *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 11610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 F.C.C. Rcd. 5936, 5954 (1994).

1994 filing deadline, as there is little reason to suppose that further pursuit of that goal would be useful."[18] Instead, the Commission indicated that it was prepared to divide the spectrum by auction, lottery, or comparative hearing.[19]

Similarly, two years into the second Little LEO processing round, an exasperated Commission issued an NPRM proposing to limit eligibility to new entrants because the eight applicants were not able to make progress in reaching a spectrum-sharing plan.[20] This eminently sensible idea might have been implemented in that round had it not been rendered unnecessary due to significant attrition in the applicant pool while the applicants protested the eligibility requirements. Thus, contrary to the assertions of various commenters, a sharing plan was only agreed upon after three of the eight applicants abandoned their proposals [21] Thus, without in any way denigrating the sharing plan ultimately adopted in the second Little LEO round, it is hard to declare a triumph of wise policy making when the regulator delays so long that a third of the applicants disappear.

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18 *Id.* at 5963.

19 *Id.*

20 Although the Commission had not formally ordered formation of a negotiated rulemaking committee, two years of meetings among applicants and the Commission had made it clear that no resolution of mutual exclusivity would occur without Commission intervention.

21 GE-Starsys returned its first round license and withdrew its second round application; GE Americom withdrew its second round application. Orbcomm's parent corporation acquired certain assets of CTA Inc., the parent of CTA, and CTA withdrew its second round application. *See Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, 13 F.C.C. Rcd. 9111 (1997).

The unfortunate but inescapable truth is that delay almost always favors somebody. When it does, it is pointless to hope that those who win by delay will voluntarily agree to anything quickly. Here, delay favors the Big LEOs and other incumbents who do not need expansion spectrum for years and do not want competitors ever. The Commission can already see that the only result of a "negotiating period" will be delay. The law does not require such a result and the public interest does not permit it.

V. Conclusion

The Commission should promptly grant ICO's petition and issue an NPRM incorporating ICO's proposed initial eligibility and processing rules that favor new applicants and segment the 2 GHz MSS band into global and regional portions.

Respectfully submitted,

By: _____

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September 11, 1998

CERTIFICATE OF SERVICE

I, Mark A. Grannis, with the law firm of Harris, Wiltshire & Grannis LLP, do hereby certify that the foregoing "Reply Comments of North American GSM Alliance LLC" were served on the parties listed below by first-class U.S. mail, postage prepaid, on this 11th day of September, 1998.

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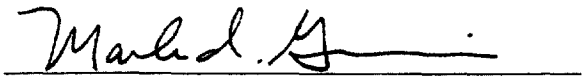

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